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Access to environmental information held by the European Union Institutions. A critical examination of the relationship between the Aarhus Convention, Regulation 1049/2001/EC regarding public access to European Parliament, Council and Commission documents and Regulation 1367/2006/EC on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decisions-making and Access to Justice in Environmental Matters to Community Institutions and bodies

Susan Wolf

Introduction

On 25 June 1998 the European Community,¹ along with 35 states (including most of the current 28 Member States of the European Union) signed the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.² The Aarhus Convention, typical of many international agreements which are concluded jointly by the EU and its Member States, binds both the Union institutions and each of the Member States.³ The Member States are bound by the Convention in their own rights, and as a matter of EU law, through their membership of the EU and the legal instruments adopted by the EU in fulfilment of its Convention obligations.⁴ This paper examines the relationship between the EU's Access to Documents Regulation⁵ and the Aarhus Regulation⁶ and the extent to which the combined provisions succeed in aligning Union law with the access to environmental information provisions of the Convention. The focus of the examination will be on the exceptions to disclosure of information and the differences between the Convention and the EU legislation will be analysed. It will be argued that not only does the EU legislation lack coherence and clarity but also that the combined provisions breach the Convention in a number of key respects. The General Court has already ruled that Article 10 (1) of the Aarhus Regulation⁷ is not compatible with Article 9(3) of the Convention (although this is subject

¹ The European Union replaces and succeeds the European Community by Article 1 Treaty on European Union.

² UNECE Convention on Access to Information, Public Participation in Decision-Making and access to Justice in Environmental Matters (1998). There are now 46 parties to the Convention.

³ Referred to as 'mixity'. For further discussion see A Rosas 'The European Union and Mixed Agreements' in A Dashwood & C Hillion (eds) *The General Law of EC External Relations* (2000) Sweet & Maxwell

⁴ Article 216 (2) Treaty on the Functioning of the European Union (TFEU) provides that agreements concluded by the EU are binding on the institutions of the EU and the Member States.

⁵ Regulation 1049/2001/EC of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents OJL 145/43 31.5.2001

⁶ Regulation 1367/2006/EC of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies OJL 264/13 25.9.2006

⁷ Case T 396/09 *Vereniging Milieudefensie & Stichting Stop Luchtverontreiniging Utrecht v Commission* at paragraph 69 (not yet published); and T-338/08 *Stichting Natuur en Milieu & Pesticide Action Network Europe* (not yet published).

to appeal) and a number of further cases are pending before the General Court in which applicants have sought to rely directly on the Convention to challenge decisions refusing access to environmental information. However, this paper will argue that even if applicants are successful in these arguments EU law fails to provide applicants with an effective judicial remedy as required by Article 9 of the Convention.

The Aarhus Convention

Described as "the most ambitious venture in environmental democracy undertaken under the auspices of the United Nations" the Aarhus Convention's ideological base is that every person has a right to live in an environment adequate to his health and wellbeing.⁸ Pragmatically the Convention does not seek to guarantee such a right, rather its focus is on the conferral of certain procedural rights which will enable individuals and their associations to protect and improve the environment for the benefit of present and future generations.⁹ Echoing the values enumerated in Principle 10 of the Rio Declaration,¹⁰ the Convention asserts that freedom of information about the environment is a necessary precondition for the public to participate in policy and decision making relating to the environment. Moreover the Convention includes important provisions on access to justice which, inter alia, allow the public to enforce their rights under the Convention. These procedural rights are enshrined in the three pillars of the Convention. The first pillar (Articles 4 & 5) is concerned with access to environmental information and is the focus of this paper. The second pillar (Articles 6-8) provides for public participation in environmental decision making.¹¹ The link between the two pillars is self-evident; in order for there to be meaningful participation in decision making the public must have access to the environmental information held by public authorities, particularly those public authorities charged with environmental decision making. It is important to emphasise this because in practice a delay in providing information in a timely fashion can potentially prejudice the informed involvement of the public in environmental decision making where representations and views need to be submitted within tight deadlines.¹² The third pillar (Article 9) requires the Convention parties to ensure that effective administrative and judicial mechanisms are in place so that the rights conferred by the Convention are protected and the law is enforced. More particularly Article 9 (1) specifies the access to justice requirements relating to access to environmental

⁸ Kofi A Anna, Secretary General of the United Nations, 1997-2006 at <http://aarhusclearinghouse.unece.org/about/> (accessed 12th August 2013)

⁹ Note 2, Recital 7

¹⁰ Rio Declaration on Environment and Development 1992 (United Nations)

¹¹ Articles 6-8 provide that the public has a right to participate in certain decisions in relation to activities (projects) that are likely to have significant effect on the environment; plans, programmes and policies relating to the environment; and during the preparation of executive regulations and/or generally applicable legally binding normative instruments.

¹² See for example, Case T-449/10, ClientEarth, European Federation for Transport and Environment (T&E), European Environmental Bureau (EEB), and BirdLife International v European Commission (not yet published).

information but must be read in conjunction with Article 9 (4) which imposes a number of important overriding conditions.¹³

Implementing measures

Prior to the conclusion of the Convention in February 2005 the EU institutions were not legally obliged to comply with the access to environmental provisions of the Convention.¹⁴ This much was confirmed by the Court of First Instance in *Case T-264/04 WWF European Policy Programme v Council*.¹⁵ The case involved a refusal by the Council to disclose documents containing environmental information but the Court of First Instance was not persuaded by arguments relating to the applicability of the Convention since at the time of the refusal neither the Aarhus Convention nor the Aarhus Regulation, which purported to implement the Convention, was in force. The existing legislation, at the time of this decision, was Regulation EC/1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter the ATD Regulation),¹⁶ which had entered into force in December 2001. It therefore post-dated the EU's signature to the Convention but predated its conclusion. In short the ATD did not purport to give effect to the obligations laid down in the Convention. On the one hand its reach went well beyond documents containing environmental information; on the other it only applied to documents held by the Parliament, Council and Commission and the exceptions to disclosure were not based on the Aarhus Convention.¹⁷ However, access to documents held by other institutions and agencies was governed by institutional specific Decisions which largely mirrored the ATD Regulation.¹⁸

Although the obligation to comply with the requirements of an International agreement arises only on conclusion of such agreement, it has been claimed that there is no need for any particular act of transposition; it being sufficient that the agreement is concluded by the Council.¹⁹ It is therefore arguable that there was no need for any new legislation to comply with the first pillar, particularly since Article 2 (6) of the ATD Regulation included a play safe clause (commonly known as the Aarhus clause) which provided that "This Regulation shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law or acts of the institutions implementing them." However, irrespective of the possibility that an international agreement is self-executing in EU law, the majority of international agreements

¹³ The procedures laid down in Article 9 (1)-(3) must in addition provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions must be given or recorded in writing and decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

¹⁴ Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decisions-making and access to justice in environmental matters OJ L 124, 17.5.2005, p 13

¹⁵ *Case T-264/04 WWF European Policy Programme v Council* [2007] ECR II-911 at paragraph 72

¹⁶ Also sometimes referred to as the 'Openness Regulation'

¹⁷ The purpose of the ATD was to give effect to the right of public access to documents and the limits of such access in accordance with Article 255 (2) EC Treaty, which only applied only to the documents of the Council, Commission and Parliament.

¹⁸ Decision 93/731 of the Council, Decision 94/90 of the Commission, Decision 97/632 of the European Parliament.

¹⁹ Eeckhout P *EU External Relations Law*, 2nd ed, Oxford EU Law Library, Oxford University Press, 2011 at p 327

concluded by the EU are implemented into Union law by means of secondary legislation. Moreover, whatever the position regarding transposition it is nevertheless incumbent on the institutions of the European Union (and its agencies and bodies) to ensure compliance with the obligations arising under the agreement once it is concluded.²⁰ In order to align existing EU law with the requirements of the Convention the EU adopted the Aarhus Regulation in September 2006.²¹ Before considering whether the combined provisions of the existing ATD Regulation and Aarhus Regulation comply with the requirements of the Convention it is worth reflecting that the Member States were required to transpose the provisions of the Environmental Information Directive into national law by 14 February 2005.²² The purpose of the Directive was to ensure consistency of national law with the Convention. The delayed transposition of the Directive, on the part of five Member States, gave rise to infraction proceedings by the Commission. In relation to Germany, Greece and Spain the cases were closed after these States had transposed the Directives.²³ In two cases the Court of Justice ruled that by not adopting, within the prescribed period, all the laws regulations and administrative provisions necessary to transpose the Directive Austria and Ireland had failed to fulfil their obligations under the Directive.²⁴ The Aarhus Regulation did not apply until 28 June 2007, some two years after the conclusion of the Convention.

In deciding how to implement the provisions of the first pillar of the Convention, one option was to adopt a specific legal instrument that would govern the rights of access to environmental information and provide the remedies required by Articles 4, 5 and 9(1) of the Convention. This would have been consistent with the approach adopted in Directive 2003/4/EC. However, the Union's preferred choice was to adopt an instrument that would deal with all three pillars of the Convention in one piece of legislation, on the basis that such an approach would 'contribute to rationalising legislation and increasing transparency of the implementation measures taken with regard to [Union] institutions and bodies'.²⁵ Consequently the Aarhus Regulation 'builds upon' the ATD Regulation. It does this through the use of a somewhat cumbersome statutory device by which "Regulation 1049/2001 shall apply to any request by an applicant for environmental information held by [Union] institutions and bodies".²⁶ The Commission's conclusion is that the two regulations co-exist, but are largely convergent and coherent.²⁷ However it is arguable that the resulting dual track legislation is confusing to the ordinary citizen. It is settled law that where Member States are under an obligation to implement directives "the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights", particularly where the directive is intended to accord rights.²⁸ It is difficult to see why the EU legislation should escape such a basic requirement.

²⁰ Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie . KG a A.* [1982] ECR 3641 at 11

²¹ See note 6

²² Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC OJ L 41/26 14.2.2003

²³ Cases C-44/07, C-85/06 and C-53/06 against Germany, Greece and Spain respectively.

²⁴ Case C-340/06 *Commission v Austria* [2007] ECR and Case C-391/06 *Commission v Ireland* [2007] ECR I-65

²⁵ Aarhus Regulation, Recital 5

²⁶ Aarhus Regulation, Article 4

²⁷ See Commission Green paper –Public Access to Documents held by Institutions of the European Community: A Review, COM 2007/0185 final at Section 6

²⁸ See for example, Case C-365/93 *Commission v Greece* [1995] ECR I -499; Case C -96/95 *Commission v Germany* [1997] ECR I 1653

The Aarhus Regulation seeks to address those Convention provisions that are not, in whole or in part, to be found in the ATD Regulation.²⁹ It aims to align the ATD Regulation with the Convention but only in relation to environmental information; the integrity of the ATD Regulation remains in relation to information that does not fall within the definition of environmental information.³⁰ The Aarhus Regulation succeeds in this objective on a number of counts. First, Article 3 extends the application of the ATD Regulation to all of the Union's institutions, agencies and bodies³¹ even to the extent that it applies to institutions and bodies acting in a legislative capacity, albeit these may be excluded under the Aarhus Convention.³² Institutions and bodies acting in a judicial capacity are not included. The Aarhus Regulation also addresses the beneficiary limitations of Article 2 of the ATD Regulation by extending the right of access to environmental information to any natural or legal person without discrimination on the grounds of citizenship, nationality, domicile or registered seat.³³ Further, Articles 4 and 5 of the Aarhus Regulation impose duties on the Union's institutions and bodies to collect and disseminate environmental information and to ensure its quality (that it is up to date, accurate and comparable), in accordance with Article 5 of the Convention. A consideration of the extent to which the EU complies with this 'progressive dissemination' aspect of the Convention is outside the scope of this paper. However, it almost goes without saying that the more information that is made readily and easily accessible to the public should significantly reduce the number of requests for information. Despite the huge volume of information that is accessible on line via the various institutional sites and Eurlex, and Prelex, requests for documents information continue to form a significant part of the information rights landscape of the EU.³⁴ This may be because the information sought is difficult to find. But it is more likely to be because the information has been withheld from the public. The Aarhus Convention does not require Parties to actively disseminate environmental information which it might otherwise refuse to disclose under one of the Convention exceptions to disclosure.³⁵ The focus of the remaining discussion is therefore on the extent to which the exceptions to disclosure in the EU's ATD and Aarhus Regulations are compatible with the grounds for refusal permitted by the Convention. It is accepted that the issue of compliance does not revolve entirely around the exceptions. There are, without doubt, real questions about the extent to which the institutions are complying, in practice, with the time limits for dealing with requests both at the application and confirmatory application stages. There are also other issues which brevity does not permit any further examination of. For example, the distinction between the right of access to documents (under the EU regulations) as opposed to information under the Convention; the rights of Member States to request that a document originating from a

²⁹ Aarhus Regulation, Recital 13

³⁰ The definition of environmental information is provided in Article 2 (d) Aarhus Regulation and conforms to the corresponding definition in Article 2 Aarhus Convention.

³¹ "any public institution, body, office or agency established by, or on the basis of, the Treaty". Article 2 (1) (c) Aarhus Regulation

³² Aarhus Regulation, Recital 7

³³ Article 3 Aarhus Regulation.

³⁴ In 2011 there were 6447 applications for documents. See Report from the Commission on the application in 2011 of Regulation (EC) No. 1049/2001 regarding public access to European Parliament, Council and Commission documents. COM 2012/ 0429 final.

³⁵ Aarhus Convention, Article 5 (10)

Member State should not be disclosed;³⁶ the duty to give reasons for non-disclosure and to consider the possibility of partial disclosure; and the procedural treatment of sensitive documents.³⁷

The exceptions to disclosure

Compliance difficulties arise in relation to the exceptions to disclosure because the Aarhus Regulation failed to address all of the differences between the ATD Regulation and the Convention and therefore failed to achieve symmetry with the Convention. Moreover the structure of the legislation lacks coherence and clarity.

Recital 15 Aarhus Regulation states that where the ATD Regulation “provides for exceptions, these should apply subject to any more specific provisions” of the Aarhus Regulation where the request concerns environmental information. The General Court, reading Recital 15 in conjunction with Articles 3 and 6 of the Aarhus Regulation, described the latter regulation as a *lex specialis* in relation to the ATD Regulation, by ‘replacing, amending or clarifying certain provisions’ of the ATD Regulation.³⁸ The net practical effect of this is that it is necessary to read across both Article 4 of the ATD Regulation and Articles 3 and 6 of the Aarhus Regulation in order to get a complete picture of the exceptions to disclosure, as they relate to environmental information. Even if the combined provisions truly align themselves with the Convention it has to be questioned whether this rather complex statutory manoeuvre satisfies Article 3 of the Convention which requires the Parties to provide a clear, transparent and consistent framework of implementing measures, which assist the public in understanding the nature and scope of their rights.³⁹ In comparison the Environmental Information Directive 2003/4/EC follows the structure and the wording of the Convention very closely, as do for example, the implementing measures in England and Wales.⁴⁰ In order to achieve the desired clarity there are strong arguments that the EU should have adopted a similar approach and legislated a standalone regulation relating to access to environmental information which in turn would clearly enumerate the exceptions to disclosure in line with the Convention. Since this is not the case the question is whether the combined provisions of the ATD and Aarhus Regulations comply with the Convention. The answer is they don’t, not just because of the convoluted structure but also because of a number of significant textual differences.

The grounds for refusal listed in Article 4 (3) of the Convention fall into three types; procedural, class based and where disclosure would adversely affect one of the listed protected interests. Significantly all are subject to the requirement that they be interpreted “in a restrictive way taking into account

³⁶ ATD Regulation, Article 4 (5). However in Case C64/05 Sweden v Commission [2007] ECR I-11389 the ECJ held this does not constitute a right of veto

³⁷ ATD Regulation, Article 9

³⁸ Case T-29/08 Liga para Protecção da Natureza (LPN) v European Commission [2011] ECR II-06021 at 105. This case is subject to a pending appeal in Case C-605/11P

³⁹ Note 2, Aarhus Convention- Article 3 (1) Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.

⁴⁰ The Environmental Information Regulations 2004 SI No. 2004/3391

the public interest served by disclosure and taking into account whether the information requested relates to emissions".⁴¹ The Aarhus Regulation (Article 6 (1)) seeks to incorporate this requirement into the ATD Regulation, which lists the exceptions to disclosure in Articles 4 (1) and (2). Somewhat unfortunately a literal reading of the second sentence of Article 6 (1) suggests that the requirement to interpret restrictively only applies to 'the other exceptions' set out in Article 4 (i.e. only to the Article 4(1) exceptions and the second indent of Article 4(2)). However, the General Court in Case T 29/08 LPN v Commission has confirmed that the duty of restrictive interpretation applies to all the exceptions, consistent with the general principle that any exception to an individual right, including the right of access to documents, must be applied and interpreted in a restrictive way.⁴²

The Convention includes two safeguards that help the Parties understand what is meant by 'restrictive'; the first is that in all instances the public authority must take into account the public interest in disclosure.⁴³ This requires public authorities to "weigh the public interest served by disclosure against an interest protected by one of the exceptions."⁴⁴ Since the Convention leaves no room for absolute exceptions it was necessary for the Aarhus Regulation to clarify that the exceptions listed in Article 4 (1) of the ATD Regulation are now all subject to the public interest test.⁴⁵ (The exceptions in Article 4 (2) ATD were already subject the public interest test). Neither the ATD or Aarhus Regulation define a procedure to examine grounds for 'weighing' the public interest served by disclosure against the interest served by the grounds for refusal, although the Court of Justice has ruled (in the context of the Environmental Information Directive) that a public authority may take into account cumulatively a number of the grounds for refusal and is not compelled to weigh each individually against the public interest.⁴⁶ When an institution decides to refuse access to a document it must first explain how access to that document could specifically and effectively undermine the public interest protected by an exception laid down in Article 4. The risk must be reasonably foreseeable and not purely hypothetical.⁴⁷ It is in principle, open to the institution to base its decisions in that regard on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature. However, it is incumbent on the institution to establish in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose.⁴⁸ In addition the institution must explain how the public interest vested in the exception overrides the public interest in disclosure. It is apparent that the institutions enjoy a wide discretion when considering whether access to a document(s) may undermine a public interest. This clearly limits the Court's capacity to verifying whether the procedural rules and the duty to state reasons have been

⁴¹ Aarhus Convention, Article 4 (4)

⁴² Note 36 at para 107

⁴³ The Aarhus Convention: An Implementation Guide 2013 (2nd edition). Edited by Ebbesson J., Gaugitsch H., Jendroška J., Stec S., and Marshall F. At p 86

⁴⁴ Although the exception on the grounds that information is not held under Article 4 (3) (a) of the Convention is by its very nature not amenable to such a balancing exercise. See Advocate General Kokott's Opinion in Case C-71/10 Office of Communications v Information Commissioner 10 . 3. 2011

⁴⁵ Aarhus Regulation, Article 4 (1)

⁴⁶ Case C-71/10 Office of Communications v Information Commissioner [2011] ECR I-7205

⁴⁷ Case T-211/00 Kuijer v Council [2002] ECR II-485

⁴⁸ See Joined Cases C-39/05 P and C-52/05 P Sweden and Turco v Council [2008] ECR I-4723, paragraphs 44-45; and also Case T-121/05 Borax Europe Ltd. Commission [2009] ECR II-27

complied with; the facts have been accurately stated and whether there has been a manifest error of assessment of the facts or misuse of power.⁴⁹ Once again by way of contrast the English Information Commissioner has the power (as does the Information Rights Tribunal) to reach a decision on where the public interest lies.⁵⁰

The second safeguard requires public authorities to *take into account* whether the information requested relates to emissions into the environment in relation to all of the exceptions listed.⁵¹ Although the Convention clearly places a high priority on the disclosure of information on emissions it doesn't actually accord information on emissions the status of an 'override' save in relation to the commercial confidentiality exception.⁵² Because the ATD Regulation makes no reference to information on emissions amendment was necessary, but in making this amendment the EU went somewhat further than was required by the Convention. By the first sentence of Article 6(1) Aarhus Regulation "an overriding public interest in disclosure shall be deemed to exist where the information relates to emissions" in relation to not only the commercial confidentiality exception, but also in relation to the exception relating to intellectual property, the purpose of inspections and audits (but not investigations). The effect of this is that in relation to those exceptions, Article 6 (1) lays down a presumption of law that an overriding public interest in disclosure exists where the requested information relates to emissions into the environment. Consequently there is no need to balance the competing public interests in disclosure. This presumption does not apply to documents relating to investigations (and in particular those concerning possible infringements of EU law) and the other exceptions listed in Article 4 (1) ATD Regulation, but it is still necessary to *take into account* whether the information requested relates to emissions into the environment.⁵³

Although Article 6 (1) Aarhus Regulation imports these 'general' requirements into Articles 4 (1) and (2) of the ATD Regulation and Article 6 (2) adds the environmental protection exception (more of which later) the Aarhus Regulation fails to fully align the grounds for refusal with those listed in the Convention. Accepting that there is no requirement for the EU legislation to adhere verbatim to the Convention there must be substantive compliance. Moreover, the Convention lays down minimum guarantees which, whilst they do not affect the right of a Party to maintain or introduce a broader access to information regime, prevent the Parties from adding any additional exceptions other than those listed in Article 4 of the Convention. A Member State would be exceeding its discretion and in breach of its obligations under the Treaties were it to include exceptions not contained in the

⁴⁹ See Case T-211/00 *Kuijter v Council* (Note 45) at paragraph 53 and also Case T-264/04 *WWF European Policy Programme v Council* [2007] ECR II-911

⁵⁰ See for example ?????

⁵¹ Note 36 at page 86

⁵² Aarhus Convention (note 2), Article 4 (4) (a) Information on emissions which is relevant for the protection of the environment shall be disclosed.

⁵³ For further discussion of the 'emissions' override and definition of emissions see Advocate General Kokott's Opinion in Case C-266/09 *Stichting Natuur en Milieu Vereniging Milieudefensie Vereniging Goede Waar & Co. v College voor de toelating van gewasbeschermingsmiddelen en biociden* [2010] ECR I 13119

Environmental Information Directive.⁵⁴ However despite the fact that the first three indents in Article 4(1)(a) ATD Regulation broadly correspond⁵⁵ with Article 4 (4) of the Convention, the Aarhus Regulation failed to remove the fourth indent relating to the “public interest in the financial, monetary or economic policy on the part of the Parties”. This is not one of the listed Convention exceptions and, whilst in practice it does not appear to be widely utilized⁵⁶ its inclusion constitutes a clear breach of the Convention.

The exceptions listed in Article 4(2) of the ATD Regulation are also problematical. First, the commercial confidentiality exception (in the first indent) applies if disclosure would undermine the protection of the commercial interests of a natural or legal person (including intellectual property). However the Convention (and the Environmental Information Directive) requires that such confidentiality must be ‘protected by law in order to protect a legitimate economic concern.’⁵⁷ The omission in the ATD Regulation could be significant. For example in the UK the First Tier (Information Rights) Tribunal has held in a number of cases held that it isn’t sufficient that information is claimed to be confidential, the confidentiality must be protected by law (either by statute, contract or the common law duty of confidence).⁵⁸ Consequently the exception in the ATD Regulation is more expansive than the Convention and capable of protecting more information than is intended by the Convention. Given that this exception is increasingly being invoked by the institutions this is a particular cause for concern.⁵⁹ Second, the second and third indents of Article 4 (2) state that an institution shall refuse to disclose a document where disclosure would undermine the protection of court proceedings and legal advice (second indent) and the purpose of inspections, investigations and audits (third indent). These are not delimited in any way. The corresponding Convention exception protects the ‘course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature’. Although the exceptions are worded differently they appear to be protecting the same interests, that is with the exception of audits. It is difficult to see how an audit, particularly where it concerns expenditure of public monies fits with this Convention exception.

Internal communications

Further differences arise in relation to the ‘internal communications’ exception provided by the Convention. Coppel claims that in the absence of an immediately obvious, universal public interest

⁵⁴ Report from the Commission to the Council and the European Parliament on the experience gained in the application of Directive 2003/4/EC on Public access to Environmental Information, COM 2012 774 final, at p 7

⁵⁵ Article 4 (1) ATD Regulation lists defence and military matters in the second indent whereas the Convention refers only to national defence

⁵⁶ In 2012 only 1.4% of applications were refused on the basis of this exception. See note 52 at Annex 1.

⁵⁷ The Directive, at Article 4 (2) (d) refers to the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law. See also Case C -204/09 Flachglas Torgau GmbH v Federal Republic of Germany(not yet published) at paragraph 61

⁵⁸ Jones v Information Commissioner & Environment Agency EA/2011/0157 27.04.2012; South Gloucestershire CC v Information Commissioner & Bovis Homes EA/2007/0032 20.10.2009

⁵⁹ The protection of commercial interests was invoked in 16.83% of cases in 2011 compared with 11.84% in 2010. See note 32

in maintaining an exception that entitles refusal on the basis that ‘the request involves the disclosure of internal communications’ it is necessary to unpick the objectives underlying the exception.⁶⁰ The Aarhus Implementation Guide suggests that it may be intended to protect the personal opinions of government staff but cautions that opinions or statements expressed by public authorities acting as statutory consultees as part of a decision making process cannot be considered internal communications, neither can factual material or studies commissioned by public authorities from related but independent bodies.⁶¹ The underlying rationale for this exception therefore lies in the notion of providing private space for officials to express views and opinions at the early stages of decision making. Unlike the Directive, which verbatim transposes this exception, the corresponding provision in the ATD Regulation is Article 4 (3). This provides that access to a document drawn up by an institution for internal use (or received by an institution) which relates to a matter where the decision has not been taken by the institution shall be refused if disclosure would seriously undermine the institution’s decision making process, unless there is an overriding public interest in disclosure. The second paragraph relates to documents containing opinions for internal use as part of deliberations and preliminary consultations and states that an institution shall refuse to disclose these even after the decision has been taken if disclosure of the document would seriously undermine the institutions decision making process. On the one hand the wording of Article 4 (3) results in narrower exception because it incorporates an adverse effect threshold which is not required by the Convention. The threshold is set quite high with the requirement that disclosure would seriously undermine the decision making process. If disclosure would not have this effect the information must be disclosed and even if disclosure would have this effect the institution must disclose if there is an overriding public interest in disclosure. On the other hand the first paragraph of Article 4 (3) also extends the protection to information received by an institution. It is difficult to see how this might be justified under any of the Convention exceptions except perhaps the interests of a third party who has supplied the information voluntarily.⁶²

The inclusion of the environmental protection exception contained in Article 4(4)(h) of the Convention was absolutely essential and this has been achieved by Article 6 (2) Aarhus Regulation. The addition is almost verbatim the Convention and as such is the most closely aligned of all the exceptions, particularly since it provides that an institution ‘may’ refuse access to environmental information where disclosure would ‘adversely affect’ the protection of the environment to which the information relates. This highlights another substantive difference between the ATD Regulation and the Convention in that all of the exceptions (except the environmental protection exception) are expressed in mandatory terms; an institution ‘shall’ refuse to disclose if the conditions of the exception are engaged. In short the institutions appear only to have discretion in deciding whether a protected interest is undermined, whether the information relates to emissions and whether there is an overriding public interest in disclosure. If the exception is engaged they have no option but to refuse disclosure. However, the AIG suggests that public authorities should have discretion to decide whether to withhold information rather than being obliged to. This is certainly the case in the Environmental Information Regulations in England & Wales. The point may be moot in that it is unlikely in practice that a public authority will disclose information if all the elements of the

⁶⁰ Coppel P Information Rights Law & Practice , 2010 (3rd edition) Hart Publishing, at page 207

⁶¹ See note 41, at page 79

⁶² Aarhus Convention (Note 2) Article 4 (4) (g) Where disclosure would adversely affect the interests of a third party which has supplied the information requested without that party being under or capable of being under a legal obligation to do so, and where that party does not consent to the release of the material.

exception are engaged. Nevertheless it is arguable that the lack of discretion on the part of the EU institutions potentially breaches the Convention.

In respect of the exceptions, the ATD Regulation includes two important provisions relating to consultation with third parties and Member States, which were not altered by the Aarhus Regulation but are not in themselves contrary to the Convention.⁶³ Consultation with third parties relating to the disclosure of the third party's document(s) may in fact be good practice particularly if there are considerations relating to the disclosure of confidential business information or information protected by intellectual property rights. However the ATD Regulation doesn't impose any time frames for such consultation and therefore any delays during the consultation process may delay a decision on disclosure. Consultation with Member States (under Article 4 (3)) re disclosure of documents originating from the Member State has been problematical but the Court of Justice has ruled that this does not give Member States a right of veto on disclosure and where Member States object to disclosure they must cite exceptions in the Regulation.⁶⁴ Although this doesn't cause any direct Convention compliance issues in practice consultation with Member States may be protracted and cause delays in providing decisions to applicants within the prescribed time frames.

Challenging refusal decisions

The Aarhus Convention requires that requests for environmental information are responded to as soon as possible and at the latest within one month after the request has been submitted. The ATD Regulation imposes a much stricter deadline of only 15 working days for the institution to either or give a written reply explaining the reasons for non or partial disclosure. This deadline can only be extended in exceptional circumstances when the request is for very long or large number of documents; and then only to allow an extension of 15 days. Failure by the institution to reply within the prescribed time-limit entitles the applicant to make a confirmatory application. Confirmatory applications are also to be handled promptly and within 15 days the institution is required to either grant access or provide a written explanation of why they are confirming their decision. Further to this a dissatisfied applicant has the right to institute court proceedings before the General Court (under Article 263 TFEU) or complain to the Ombudsman. On paper this raises no Convention compliance issues. However, even a cursory examination of the cases before the General Court and Ombudsman reports shows that applicants often experience significant delays and that the Institutions are not always working within these timeframes.⁶⁵ In particular, difficulties arise where the institution fails to reach an express decision on a confirmatory application within the prescribed period. Although this constitutes an implied negative decision⁶⁶ which is amenable to judicial review, a challenge to an implied

⁶³ ATD Regulation, Articles 4 (4) and 4 (5)

⁶⁴ Case C64/05 Sweden v Commission [2007] ECR I-11389

⁶⁵ See for example, <http://www.ombudsman.europa.eu/cases/decision.faces/en/5515/html.bookmark>, accessed at 23rd January 2013

⁶⁶ ATD Regulation, By Article 8 (1) - failure to reply to a confirmatory application within the prescribed period shall be considered a negative reply and entitle the applicant to institute court proceedings and/or complain to the Ombudsman.

decision may lose its purpose and be inadmissible if the institution subsequently issues a delayed express decision.⁶⁷ In the ClientEarth T&E case⁶⁸ the General Court was not prepared to adjudicate on an earlier implied negative decision because the Commission had, some six months later issued an express decision on the basis that the review should have been against the later express decision. Such a stance is regrettable because effectively leaves the institutions beyond judicial reproach or sanction where they fail to meet deadlines, does nothing to deter future unlawfulness and may result in damage by making it impossible for the applicants to participate in the decision making process. This also creates legal uncertainty for applicants as to when to commence judicial review proceedings and consequently claims may be struck out as inadmissible for failure to lodge a case within the time limit.

Breach of the Convention as a ground for review

A challenge to a decision must be based on an argument that the contested measure breaches, inter alia, the Treaties or any rule of law relating to their application. Whilst this clearly allows applicants to challenge refusal decisions addressed to them on the basis that they breach the provisions of the ATD/Aarhus Regulations the question is whether applicants may rely directly on the provisions of the Convention. In a number of relatively recent cases currently pending before the General Court applicants have sought to do this.⁶⁹ In particular in Case T-545/11 *Stichting Greenpeace Nederland and PAN Europe v Commission* the applicants argue that Commission's decision not to allow disclosure of certain information is not in accordance with Article 4 of the Aarhus Convention.⁷⁰ It must be recalled that an agreement, such as the Convention, concluded by the Council is binding on the Union's institutions and the Member States.⁷¹ It is also settled law that such an agreement forms an integral part of the EU's legal order and the Court of Justice ensure compliance with it.⁷² However, the question of whether an individual may rely directly on the provisions of such an agreement to assert a right must be determined in the light of the wording, purpose and nature of the agreement. The provisions of the agreement must contain a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.⁷³ The difficulty here is that Article 4 of the Convention specifically confers on public authorities (including the EU institutions) discretion regarding the application of the exceptions to disclosure. This was one of the problems in the so called Brown Bears case where the Court of Justice held that Article 9

⁶⁷ See for example, Case T-449/10, ClientEarth, European Federation for Transport and Environment (T&E), European Environmental Bureau (EEB), and Case T 56/13 ClientEarth and Stichting BirdLife Europe v European Commission. (not yet published)

⁶⁸ Ibid, at paragraphs 41-42

⁶⁹ See Cases T 111/11 ClientEarth v Commission; T-214/11 ClientEarth and PAN Europe v EFSA; T-245/11 ClientEarth and International Chemical Secretariat v ECHA (not yet published)

⁷⁰ Case T545/11 Stichting Greenpeace Nederland and PAN Europe v Commission

⁷¹ Article 216 (2) TFEU

⁷² Case 181/73, Haegeman [1974 ECR 449, paragraph 5; Case 104/81 Kupferberg [1982] ECR 3641 ; Case 12/86, Demirel [1987] 3719, paragraph 7. Case C -431/05 Merck Genéricos- Productos Farmacéuticos Lda/ Merck Co. Inc, Merck Sharp & Dohme Lda [2007] ECR I 7001, at paragraph 31.

⁷³ Case 12/86 Demirel v Schwäbisch Gmünd [1987] 3719

(3) of the Convention was not capable of direct effect because it envisaged the adoption of further measures at the national level to determine which members of the public are deemed to have standing. The Court also concluded that Art 9(3) of the Convention lacked the requisite clarity and precision.⁷⁴ It remains to be seen whether Article 4 of the Convention is capable of direct effect but given the broad discretion that public authorities have in reaching access decisions it seems unlikely that the Court will conclude that it is. If the arguments about direct effect fail then the Court will be forced to consider the alternative argument advanced in the *Stichting Greenpeace* namely that it interprets the provisions of Article 4 of the ATD Regulation in the most Convention compliant way possible.

The plea of illegality

Article 277 TFEU allows any party to annulment proceedings to challenge, indirectly, the validity of earlier measures (including Regulations) which constitute the legal basis for the decision at issue. It is settled law that if there is a conflict between an EU regulation or directive and an international agreement, the Union or Member States would have to apply the provisions of the agreement and derogate from the EU secondary law provision.⁷⁵ This precedence also has the effect of requiring EU law texts to be interpreted in accordance with such agreements.⁷⁶ Accordingly the validity of the Aarhus Regulation may be affected if it is incompatible with the Convention. In two cases decided on the same day the General Court was prepared to review the legality of Article 10(1) of the Aarhus Regulation in the light of Article 9(3) of the Aarhus Convention.⁷⁷ Although neither case concerned access to documents their relevance is clear. The position regarding the invocation of international agreements to challenge the legality of EU measures is briefly rehearsed by the General Court in both cases. According to the case law the EU judiciary may examine the validity of an EU regulation in the light of an international treaty where two conditions are satisfied; the nature and broad logic of the international agreement must not preclude this and in addition, the provisions of the Treaty/Convention must appear, as regards their content, to be unconditional and sufficiently precise.⁷⁸ However, the Court in reliance on, inter alia, Case 70/87 *Fediot*⁷⁹ and Case C-69/89

⁷⁴ Case C 240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-1255

⁷⁵ Judgment of 10.9.1996 in Case C-61/94, *Commission v Germany*, paragraph 52; judgment of 1.4.2004 in Case C-286/02, *Bellio F.lli*, paragraph 33; judgment of 10.1.2006 in Case C-344/04, *IATA e.a.*, paragraph 35, and judgment of 12.1.2006 in Case C-311/04, *Algemene Scheeps Agentuur Dordrecht*, paragraph 25.

⁷⁶ ACCC/C/2006/17 –EcreponseAddl2007.11.21e.doc 02.05.2007

⁷⁷ Case T 396/09 *Vereniging Milieudefensie & Stichting Stop Luchtverontreiniging Utrecht v Commission* and ; and T-338/08 *Stichting Natuur en Council Milieu & Pesticide Action Network Europe* (not yet published)

⁷⁸ (Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, paragraph 45, and Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others v Council and Commission* [2008] ECR I-6513, paragraph 110).

⁷⁹ Case 70/87 *Fediot v Commission* [1989] ECR 178, paragraphs 19-22

*Nakajima*⁸⁰ considered that it wasn't necessary to satisfy the direct effect condition where the EU has intended to implement a particular obligation assumed under an international agreement, or where the measure makes an express *renvoi* to particular provisions of that agreement.⁸¹ On the substantive issue the Court, in both cases, found that Article 10 (1) of the Aarhus Regulation, which limits the concept of 'acts' in Article 9 (3) of the Convention to 'administrative acts' (defined as 'measure[s] of individual scope') is not compatible with Article 9(3) of the Aarhus Convention. Both cases have been appealed; first on the ground that the Court erred in finding it could review the legality of the Aarhus Regulation and secondly that the legislative choices made by the legislature are consistent with the Convention and that the General Court had disregarded the discretion afforded to the contracting parties.⁸²

The lack of an effective judicial remedy

The most potent compliance issue arises in relation to the lack of an effective judicial remedy. Applicants may challenge the legality of a refusal decision before the General Court under the provisions of Article 263 TFEU, with a right of appeal on a point of law to the Court of Justice.⁸³ However, the EU Courts can only annul a contested refusal decision; critically neither the General Court nor ECJ has authority to order disclosure of documents.⁸⁴ Judicial review applications are only admissible in so far as they seek annulment of the contested decision and the Court will not instruct the institution to take any action to 'correct' the situation.⁸⁵ It is for the institution concerned to adopt the measures necessary to implement a judgment given in proceedings for annulment.⁸⁶ In the absence of any provisions within the Treaties requiring institutions to take the necessary measures 'expeditiously' it is usually left for the institutions to act within a reasonable time frame. In the context of disclosure of information this inevitably means further delays for applicants who may require the contested information within a specific timeframe, particularly if it relates to a public participation exercise. It is therefore entirely arguable that the Article 263 judicial review

⁸⁰ Case C-69/89 *Nakajima v Council* [1991] ECR I-2069, paragraph 31

⁸¹ Case C-149/96 *Portugal v Council* [1999] ECR I-8395, paragraph 49; Case C-93/02 P *Biret International v Council* [2003] ECR I-10497, paragraph 53; and Case C-377/02 *Van Parys* [2005] ECR I-1465, paragraph 40; see also, to that effect, with regard to the General Agreement on Tariffs and Trade (GATT), Case 70/87 *Fediol v Commission* [1989] ECR 1781, paragraphs 19 to 22, and Case C-69/89 *Nakajima v Council* [1991] ECR I-2069, paragraph 31).

⁸² Case T-388/08 is pending an appeal in Case C-404/12 P. Case T-396/09 is subject to three appeals by the Council (Case C-401/12P) Parliament (case C 402/12P) Commission (Case C-403/12P)

⁸³ On grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

⁸⁴ Article 264 TFEU. See also Case T-47/96 *SDDDA v Commission* [1996] ECR II-1559, paragraph 45, and Case T-127/98 *UPS Europe v Commission* [1999] ECR II-2633, paragraph 50

⁸⁵ See for example, Case C-5/93 P *DSM v Commission* [1999] ECR I-4695, paragraph 36; and Case T-145/98 *ADT Projekt v Commission* [2000] ECR II-387, paragraph 83.

⁸⁶ Article 266 TFEU. See also Case T-67/94 *Ladbroke Racing v Commission* [1998] ECR II-1, paragraph 200, and judgment of 29 September 2009 in Joined Cases T-225/07 and T-364/07 *Thomson Sales Europe v Commission*, not published in the ECR, paragraph 221).

procedure fails to secure the adequate and effective remedy required by Article 9 (4) of the Convention. By contrast in the UK the Information Commissioner has the power (subject to review by the Information Rights Tribunals and Upper Courts) to order disclosure of documents within a specified timeframe.⁸⁷

Conclusion

The Aarhus Regulation intended to align EU law with the provisions of the Aarhus Convention. Unfortunately in the absence of a distinct legal measure which deals exclusively with access to environmental information it is necessary to read across the combined provisions of the ATD and Aarhus Regulations to determine whether the EU achieved this objective. Not only is this unsatisfactory in terms of clarity, but the combined provisions do not completely align themselves with the Convention. In particular the grounds for refusing documents/information in the ATD Regulations are wider than those contained in the Convention and are couched in mandatory rather than discretionary terms. It remains to be seen how the EU courts will respond to the cases that are now pending which raise issues relating to the direct effect of the Convention and raise a plea of illegality in respect of the Aarhus Regulation. However the biggest compliance issue arises not in relation to differences in the provisions, but in the lack of an effective judicial remedy inherent in Article 263 TFEU. Moreover it would appear that the institutional practice of issuing delayed express decisions outside the prescribed time frames can devoid legal challenges of purpose, without any institutions incurring any sanction, other than an adverse award of costs.

⁸⁷ S 50 Freedom of Information Act 2000

Although the EU Courts have exercised their jurisdiction in cases relating to inter alia the interpretation and scope of the exceptions and the assessment of the public interest.⁸⁸

⁸⁸ See for example, Cases C-39 & 52/05 Sweden and Turco v Council [2008] ECR I-4723